

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Petition of SunCom Wireless, Inc. For Designation as an)	
Eligible Telecommunications Carrier in Georgia, North)	
Carolina, Tennessee, and Virginia)	
)	
)	
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
)	

SUNCOM WIRELESS, INC. REPLY COMMENTS

SunCom Wireless, Inc. (“SunCom”), pursuant to the Commission’s Public Notice, DA 05-1952 (released July 6, 2005), hereby submits its Reply to the Comments filed on July 20, 2005, by TDS Telecommunications Corp. (“TDS”), the National Tribal Telecommunications Association (“NTTA”), and CTIA – The Wireless Association (“CTIA”) on SunCom’s Petition for Designation as an Eligible Telecommunications Carrier (“ETC”) in Georgia, North Carolina, Tennessee, and Virginia, filed on June 23, 2005 (“Petition”).

In its Petition, SunCom demonstrated that it satisfies all the established criteria for ETC designation, that the state commissions in these four states lack jurisdiction over the Petition, and that designating SunCom as an ETC would benefit the public interest. SunCom first demonstrated that the state commissions of Georgia, North Carolina, Tennessee, and Virginia have each unambiguously declared that they do not have jurisdiction to designate commercial mobile radio service providers (“CMRS providers”) as ETCs. 1/ Next, the Petition established that SunCom satisfies all the applicable criteria for ETC designation, because

1/ Petition at 3-4.

SunCom currently provides or will provide upon designation “all the services and functionalities supported by the federal universal service program, as set forth in Section 214(e) of the Act and Section 54.101(a) of the Commission’s Rules, throughout the service area for which it seeks ETC designation in Georgia, North Carolina, Tennessee, and Virginia.” ^{2/} SunCom also showed that it offers the supported services over a combination of its own facilities and resale of other carriers’ services, and that it advertises the availability of the supported services in a manner that informs the general public within the designated service area of both the services available and the corresponding charges. ^{3/} Finally, SunCom demonstrated that a grant of the Petition will serve the public interest, citing the benefits of increased competitive choice and of the unique mobile telephony option afforded by the high quality telecommunications service offering that SunCom will provide with only a negligible impact on the overall universal service high-cost fund. ^{4/} The Petition also proved that SunCom satisfies each prong of the applicable *Virginia Cellular* public interest standard. ^{5/}

In its comments, CTIA confirms all of these points made in the Petition. ^{6/} CTIA notes that SunCom satisfied the Commission’s standard for demonstrating that CMRS providers are not subject to the jurisdiction of the relevant state commissions, and notes as well the fact that SunCom offers or plans to offer in the designated area all of the nine services and

^{2/} *Id.* at 5 (citing SunCom’s provision of services such as voice grade access to the public switched telephone network; local usage; dual-tone, multi-frequency signaling, or its equivalent; single-party service, or its functional equivalent; access to emergency services, operator services, interexchange service, and directory assistance; and toll limitation for qualifying low income customers).

^{3/} *Id.* at 9.

^{4/} *See id.* at 12-15.

^{5/} Federal-State Joint Board on Universal Service; Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia, *Memorandum Opinion and Order*, 19 FCC Rcd 1563 (2004) (“*Virginia Cellular*”).

^{6/} CTIA Comments at 2-5.

functionalities supported by the federal universal service program. ^{7/} SunCom concurs with CTIA’s conclusion that an expedient grant of the Petition “would serve the public interest by increasing the availability of new, competitively priced services and technologies in the states’ communities.” ^{8/} Moreover, SunCom concurs with TDS’s statement that the Commission should carefully scrutinize SunCom’s commitment to provide supported services throughout the designated service area – but not with the suggestion that TDS is somehow better suited than the Commission to review and evaluate SunCom’s Network Plan. ^{9/} In any event, we are confident that such scrutiny will abundantly confirm our intention to serve.

The Commission should reject TDS’s unfounded request to defer decision on the Petition during the pendency of various petitions for reconsideration, as well as TDS’s arguments that the Commission should assess the Petition in light of new criteria that were not in effect when SunCom filed. ^{10/} The Commission is obligated, as a legal matter, to reject TDS’s argument that the Petition should be processed pursuant to the newly adopted standards in the *ETC Designation Framework Order*. ^{11/} As noted in the Petition, the newly adopted rules did not take effect until June 24, 2005, thirty days after the appearance of the new rules in the Federal Register on May 25, 2005. ^{12/} Furthermore, as the Petition also notes, the information collection requirements in the *ETC Designation Framework Order* – including 47 C.F.R.

^{7/} *Id.* at 2-3.

^{8/} *Id.* at 5.

^{9/} TDS Comments at 3. In its comments, TDS “urge[d] the Bureau either to apply this rigorous scrutiny on its own *or, preferably*, to issue a protective order establishing a process through which TDS Telecom may review, evaluate, and comment on the SunCom Network Plan.” *Id.* (emphasis added).

^{10/} *Id.* at 2.

^{11/} *Id.* at 2-3, citing *Federal-State Joint Board on Universal Service*, Report and Order, 20 FCC Rcd 6371 (2005) (“*ETC Designation Framework Order*”), *petitions for reconsideration pending, petition for review pending*.

^{12/} Petition at 12, n.27 (citing 70 Fed. Reg. 29960 (May 25, 2005)).

§ 54.202, which contains the relevant standards that will apply to applicants for ETC designation – cannot and will not take effect until they have been approved by the Office of Management and Budget pursuant to the Paperwork Reduction Act. ^{13/} As the Commission made clear in granting the ETC designation request of NTELOS in mid-June, “[c]arriers that had ETC petitions pending before the *ETC Designation Order* took effect, such as NTELOS, will [] be required to make [additional] showings when they submit their annual certification filing no later than October 1, 2006.” ^{14/} The Commission thus rejected the very same argument that TDS makes here. It would be arbitrary for the Commission to follow a different approval process for other petitions that, like the NTELOS request for ETC designation, were pending before June 24, 2005. Therefore, there is no basis for concluding that the Commission may apply the new designation requirements set forth in the *ETC Designation Framework Order* to petitions that were pending before the new rules took effect. ^{15/}

The Commission has consistently rejected the argument that ETC applications should be delayed or deferred pending resolutions of outstanding petitions for reconsideration or other proceedings, and should once again reject that argument here. ^{16/} Potential rule changes can be addressed properly in the pending rulemaking proceeding but cannot lawfully be considered in individual ETC designation proceedings. On this basis, the Wireline Competition

^{13/} *Id.* (quoting *Notice of Public Information Collections Being Reviewed by the Federal Communications Commission*, 70 Fed. Reg. 24787 (May 11, 2005)). This *Notice* reiterated that “[a]n agency may not conduct or sponsor a collection of information unless it displays a currently valid [OMB] control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act that does not display a valid control number.” *Id.*

^{14/} Federal-State Joint Board on Universal Service; Virginia PCS Alliance, L.C. and Richmond 20 MHz LLC d/b/a/ NTELOS Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia, *Order*, DA 05-1663, ¶ 8 (WCB rel. June 14, 2005).

^{15/} *See generally* 5 U.S.C. § 553(d) (“The required publication or service of a substantive rule shall be made not less than 30 days before its effective date”); *see also id.* § 552(a)(1).

^{16/} *See* TDS Comments at 1-2.

Bureau has correctly granted other ETC applications time and again, notwithstanding virtually identical objections to those that TDS raises here. ^{17/} As a practical matter, SunCom also notes that parties other than those listed by TDS filed petitions for reconsideration of the *ETC Designation Framework Order*, arguing that certain rules adopted in that *Order* are overly burdensome on CMRS providers and not competitively neutral. ^{18/} Whatever the Commission's decision on these competing reconsideration requests may be, it is clear that SunCom's Petition must be judged on the basis of the ETC designation rules in force when the Petition was filed. The Petition amply demonstrated that SunCom meets all of the requirements for designation, notwithstanding TDS's meritless speculations about SunCom's coverage maps and network improvement plan.

Finally, the Commission should likewise reject NTTA's assertions regarding the sufficiency of the Petition and the Commission's authority to grant it. SunCom enthusiastically looks forward to the opportunity to provide service as an ETC to Native Americans on tribal lands, including the Eastern Cherokee Reservation in North Carolina. We are perplexed, however, about the objection raised by NTTA. Even if NTTA were correct and the Eastern Cherokee Government, rather than the State of North Carolina, had authority over wireless telecommunications providers operating on the reservation for ETC designation purposes, then SunCom would be obligated to seek designation before the FCC pursuant to Section 214(e)(6) of the Act – which is precisely what SunCom has done! The Act does not authorize tribal

^{17/} Federal-State Joint Board on Universal Service; Cellular South License, Inc. Petition for Designation as an Eligible Telecommunications Carrier Throughout Its Licensed Service Area in the State of Alabama, *Order*, 17 FCC Rcd 24393, 24406, ¶ 32 (WCB 2002) (“We recognize that these parties raise important issues regarding high-cost support. We find, however, that these concerns are beyond the scope of this Order, which designates a particular carrier as an ETC.”); *see also Virginia Cellular*, 19 FCC Rcd at 1569, ¶ 12 (granting ETC designation petition during pendency of ongoing rulemaking that could have impacted the support received by the petitioner and other ETCs in the future).

^{18/} *See, e.g.*, Petition for Reconsideration of CTIA, CC Docket No. 96-45 (filed June 24, 2005).

governments to designate ETCs under any circumstances. At worst, then, SunCom might have committed “harmless error” by neglecting to provide timely notice to the tribal government, assuming the new rules had been in effect. ^{19/} However, as NTTA’s own comments make clear, under the rules in effect when the Petition was filed, SunCom was at most obligated to provide a copy of the Petition to the appropriate state commission. ^{20/} As explained above, SunCom filed its Petition prior to the *ETC Designation Framework Order*’s effective date, and was *not* bound by the requirement in that *Order* to provide copies of its Petition to affected tribal authorities. ^{21/} Moreover, it is far from clear that the Eastern Cherokee Government has any jurisdiction over SunCom. ^{22/}

^{19/} See, e.g., Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Dos Palos, Chualar, and Big Sur, California), *Report and Order*, 19 FCC Rcd 1826, 1831, ¶ 17 (MB 2004).

^{20/} NTTA Comments at 3.

^{21/} *Id.*

^{22/} In the *Pine Ridge* case, the FCC, following the framework established in the U.S. Supreme Court’s decision in *Montana v. United States*, 450 U.S. 544 (1981), held that the Oglala Sioux Tribe – and not the State of Montana – had jurisdiction over Western Wireless’s special offering on the Pine Ridge reservation *only* because of special features that “set the agreement apart from a normal carrier-customer relationship and are directly related to the Tribe’s sovereignty interests, including the regulation of transactions between the carrier and tribal members and substantial authority over the provision of communications services to the Tribe that affect the welfare of the Tribe.” Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota; Federal-State Joint Board on Universal Service, *Memorandum Opinion and Order*, 16 FCC Rcd 18145, 18151-52, ¶ 16 (2001) (“*Pine Ridge*”). For example, the Commission found that, pursuant to a service agreement between the Oglala Sioux Tribe and Western Wireless, “Western Wireless represents that it has expressly consented to the Tribe’s regulatory authority, and the Tribe has rights to participate extensively in and administer the service plan. The Tribe, for example, assists Western Wireless in developing the service plan, deploying infrastructure, and establishing basic service rates. In addition, the agreement requires Western Wireless to give financial proceeds directly to the Tribe and give hiring preferences and training to tribal members.” *Id.* at 18151, ¶ 15 (footnotes omitted). None of those factors exists in this case; SunCom has no special relationship with the Eastern Cherokee tribe. Most importantly, the Commission found that other carriers that operate in broad areas of a state, beyond the boundaries of a reservation, and that have not expressly consented to tribal jurisdiction, ordinarily would be subject to the jurisdiction of the state commission, not the tribal government. *Id.* at 18152-53, ¶¶ 20-21; see also *id.*, Dissenting Statement of Commissioner Kevin J. Martin. Of course, in this instance, the North Carolina Utilities Commission has expressly disclaimed jurisdiction over ETC designation of wireless carriers like SunCom, so the issue is moot in any event, as discussed in the text above. See Petition at 4 & n.7, and Exhibit B-2.

Conclusion

In sum, the Commission should dismiss TDS's and NTTA's groundless objections and should proceed expeditiously to grant SunCom's Petition for Designation as an ETC in Georgia, North Carolina, Tennessee, and Virginia.

Respectfully submitted,

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August 3, 2005